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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1947.

**No. 450**

PETER L. GUTH,
Petitioner,

vs.

THE TEXAS COMPANY,
Respondent.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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## Summary of Argument.

That defendant cannot destroy plaintiff's property, without consent, or without compensating plaintiff therefor, regardless of any excuses or necessities, where such property is in the sole and exclusive possession and control of defendant, where plaintiff had nothing to do with the production or destruction of the property, nor could he have, being without power or authority in the matter, and such destruction was unnecessary and solely to save money for the defendant.

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## PETITION FOR A WRIT OF CERTIORARI

*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

### Jurisdiction Invoked.

The decision of the United States Circuit Court of Appeals for the Seventh Circuit, dismissing the suit in affirmance of the judgment below was rendered October 11, 1947. The petition is, therefore, filed timely, and the jurisdiction of this Court is invoked under Judicial Code, Section 240 (a), 28 U. S. C. A., Section 347 (a) as amended by Act of February 13, 1925.

**Opinion below.**

The opinion of the Circuit Court of Appeals is unreported at this writing and is printed in the record at pages 200-201-202.

Your petitioner, Peter L. Guth, was the owner of certain portions of the oil and gas under two farms in Marion County, Illinois, described in the record as the Chapman Lease and the Schereshovech Lease, in what is known as the Salem Pool. The portions so owned were .03125 and .0382813 respectively. The defendant, under the ordinary form of oil and gas lease produced a large amount of gas and oil thereon. The object of the letting was:

> "for the sole and only purpose of mining and operating for oil and gas and of laying pipe lines, and of building tanks, power stations and structures thereon to *produce, save and take care of said products.*" (Italics ours). (R. 7-12).

The claim for oil was dismissed out of the case without prejudice. Of the gas produced, a small amount was processed and accounted for, on the basis of .035 per thousand cubic feet. The remainder, by far the larger portion was burned by the defendant without payment therefor. Based on the gas paid for, according to plaintiff's computations, the gas belonging to plaintiff, which was burned, amounted to $112,454.57, and is the subject of this action.

Defendant's answer denied generally, all allegations of the complaint; set forth the troubles and competition met and insisted that the sole liability of defendant was under the "3rd" paragraph of the leases, which called for payment for gas:

> "produced from any oil well and used off the premises or in the manufacture of gasoline or any other product a royalty of one-eighth (1/8) of the market value at the mouth of the well."

(No mention was made in the lease of gas burned or to be burned); that it had no market for the gas at the time and had no facilities for caring for it, hence, as a matter of safety it was burned and that by reason thereof defendant is not liable therefor.

Three appeals were had in the case, two on the pleadings and a third on the merits. On the second appeal (155 Fed. (2) 563-566) the Circuit Court of Appeals said:

> "It makes no difference who wasted the gas, gasoline and petroleum distillates. If the defendant produced and had in its possession, oil and gas, it became the owner of such oil and gas, and it owed the lessors their royalty therefor."

On the third appeal, on the merits, the same court said:

> "We cannot agree that this was such possession as would make the defendant liable."

and affirmed the order dismissing the case.

## Salient Facts.

The salient facts are: Under the leases in question, the defendant was in exclusive possession and control of the premises, insofar as necessary to the production of oil and gas. The plaintiff had not, nor could he have any control, authority, or power, or other action that might look to the saving of his oil and gas under the premises. In the course of production the oil and gas entered the pipes of the defendant, whence it was conducted to defendant's "separator", a huge drum in which the gas was separated from the oil, under pressure.

The gas so separated, entered the "flare pipe" of defendant and was burned, except such of it as the defendant chose to process. Thus, through the entire process or period, from production to destruction, it was in the exclusive possession of the defendant.

There was an unlimited market for the product as commercial gasoline, if the defendant had prepared it for market, which the defendant refused to do, on the alleged ground that it would be uneconomic to build a processing plant large enough to process it, therefore the plaintiff must stand the loss, was their claim and reasoning. A witness for defendant, uncontradicted, admitted that it could have been processed or put back into the formation. A statute of the state commanded that gas so produced *and not utilized* must be destroyed. As stated, the defendant processed some 798 million cubic feet and burned the remainder. No reason was given for not putting it back into the formation.

No reason was assigned by either court why the plaintiff should be charged with the loss of his property, where he had never consented to its destruction and had absolutely nothing to do with either, its production, the manner of handling it, or its destruction, committed by the defendant as soon as it came into its possession, nor was any reason assigned why the defendant was excused from putting it back into the formation and saving it to be marketed later. Nor was any reason assigned why the cost or value of the gas should not be paid and charged as a part of the cost of production, in accordance with all accepted theories of auditing.

**Specification of errors intended to be urged.**

1. In holding that the defendant could burn and destroy plaintiff's property without compensating the

plaintiff, where plaintiff had no power or connection with such destruction, never consented to such destruction, nor did the lease grant such or any similar power to the defendant.

2. In not holding that the defendant was a trustee insofar as the property of the plaintiff was concerned and to the extent of the value of such property of the plaintiff, which came into the hands of the defendant, and that defendant should account to the plaintiff for such property, where such property was in the exclusive possession of the defendant at the time of its destruction by the defendant, where plaintiff was without any power or authority in the matter at the time of its destruction by defendant.

3. In not holding that the defendant, as trustee, was accountable for the property of the plaintiff which was in the exclusive possession, control and disposition of the defendant, and which was burned and destroyed by the defendant, while in such possession of defendant.

4. In not holding that gas is an additional and very valuable product for which defendant is liable, and for which owner must be paid.

5. In not holding that defendant must pay for all products coming into its hands, otherwise it would get a very valuable product without paying anything therefor.

6. In not holding that the defendant agreed to produce all the oil and gas under the premises in order that the plaintiff could realize on the value of those products, and since the defendant destroyed a great portion thereof, it is liable to the plaintiff for the value thereof.

7. In not holding that, even if it were necessary to burn the property (which was not the case, it could

have been put back into the formation and saved), the plaintiff must be compensated therefor and the cost charged to the product as a cost of production, where such property was in the sole and exclusive possession and under the exclusive control of the defendant, with no power of protection in the plaintiff, where it was intentionally destroyed and burned by the defendant.

8. In adopting the reasoning of the defendant, to the effect, that if the defendant cannot economically process, or take care of the gas, the owner of the raw material must stand the loss, notwithstanding that the owner had no power or authority in the matter, had never consented to the destruction or had any connection therewith, and the lease contained no such provision, authority, limitation or condition, and the defendant had destroyed the property intentionally.

9. In not holding that where the lease in question specifically provided that the defendant "produce, save and take care of said products" (referring to oil and gas), that the defendant had no authority thereunder to do otherwise and must therefore account to plaintiff for any gas belonging to plaintiff, intentionally burned and destroyed.

10. In not holding that the producer, expert in that line, when it took the lease, took with it the chance involved, in the production and caring for the property which came into its hands belonging to the plaintiff, as promised in the lease under which it operated, nor would the court, under such circumstances have the power or authority under such lease, to saddle the loss on and charge it to the owner, where such owner had nothing to do with it, never consented to the destruction and had no power or authority in the premises.

**Holdings of courts in leases of this character.**

*Ohio Oil Co.* v. *Indiana,* 177 U. S. 190-204:

"If the use he makes of his own, or its waste, is injurious to the property or health of others, such use may be restrained or damages recovered therefor." (Defense set up identical with the defense in case under consideration).

*State of Indiana* v. *Ohio Oil Co.,* 150 Ind. 21-45:

"But even if he cannot draw oil from such wells without wasting gas, and is forbidden by injunction to do so, it is only applying the doctrine that the owner must so use his property as not to injure others."

*Poe* v. *Humble Oil Co.,* 288 S. W. 264-265:

"The same duty rests upon the appellee to protect from waste in the air or upon the ground, which rests upon it to protect from underground drainage."

*Gilbreath* v. *States Oil Co.,* 4 Fed. (2) 232-235.

"It (casinghead gas) forms a most important element in petroleum oil, and, as such, the lessee would be required to pay therefor, otherwise he would be receiving a very valuable product without giving anything in return therefor."

*Wemple* v. *Producers Oil Co.,* 145 La. 1031-1045:

"We find nothing in the record to impair the doctrine that no one is presumed to give, and hence nothing to warrant the belief that it was within the contemplation of the contract between the plaintiff and the defendant that the defendant should be allowed to take more than $20,000 worth of gasoline (valued at about half the market price) from plaintiff's land within a period of less than ten months, and give nothing in return."

*Mathes* v. *Shaw Oil Co.,* 101 Pac. 998:

"The lessor should have of right what oil and gas his premises will produce."

*Pritchard* v. *Freeland Oil Co.*, 80 W. Va. 787-789:

"The lessor should of right have what oil and gas his premises produce, whether it be taken from one well or several."

*Carroll Gas & Oil Co.* v. *Skaggs*, 231 Ky. 284-291:

"But in this case the proof is sufficient to show that gas had been taken from the land which was gone forever, and to that extent of the value of the royalty the lessors were damaged."

*Daughetee* v. *Ohio Oil Co.*, 263 Ill. 518-527:

"The point is that the defendant agreed to do this in order that the lessor could realize on the value of these products."

*Ludley* v. *Pure Oil Co.*, 11 Pac. (2) 102:

(Involving casinghead gas produced with oil):

"There is a trust of fiduciary relation between the parties * * * A tenant in common receiving the common property, either wrongfully or by consent, *holds it as trustee for his co-tenant to the extent of the interest of the co-tenant who may compel an accounting.*" (Italics ours).

*Jennings* v. *Southern Carbon Co.*, 80 S. E. (W. Va.) 368-370:

"To allow him to direct developments in the manner only to the promotion of his gain and effectually to the impoverishment of the lessor's estate in the oil and gas cannot in reason be deemed even remotely contemplated by either party at the inception of the lease."

*Silver King Coalition Mines Co.* v. *Conkling Min. Co.*, 255 Fed. 740-743. (Certiorari denied, 242 U. S. 629).

(Speaking of doubt of amount of damages): "the doubt should have been and should now be so resolved, in accordance with the basic principle of the accounting of a negligent or reckless trustee or agent,

that the latter shall receive no profit from his wrongful treatment of the property of his *cestui que* trust, and the latter shall receive the just value of its property and its income."

**Reasons for granting the writ.**

1. The decision of the Circuit Court of Appeals in this case is contradictory of the decision of the Supreme Court of the United States in *Ohio Oil Co.* v. *Indiana,* 177 U. S. 190, wherein the court holds that if the producer destroys the property of others, damages may be recovered therefor. The defense in that case was identical with the defense in this case.

2. The decision of the Circuit Court of Appeals in this case is directly contradictory of the Supreme Court of the United States in *Story Parchment Co.* v. *Patterson Parchment Paper Co.,* 282 U. S. 555-563-565, wherein that court holds that a trustee must account for all property of the *cestui que* trust, coming into its hands.

3. The decision of the Circuit Court of Appeals in this case is directly contradictory of its own decision in a former appeal, 155 Fed. (2) 563-566, wherein it held that "If the defendant produced and had in its possession, oil and gas, it became the owner of such gas, and it owed the lessors their royalty therefor." The possession was in the pipes and separator of the defendant, under defendant's exclusive control, from whence it was conducted by the defendant in its pipes and burned by the defendant.

4. The decision of the Circuit Court of Appeals in this case is directly contradictory of the decision of the Circuit Court of Appeals in *Humphreys Oil Co.* v. *Tatum,* 26 Fed. (2) 882-884, in that it specifically allows the

defendant to impair the lease, by destruction of the propulsive force, the gas, whereas the federal court in the above case decided that "there would certainly be an implied covenant that the lessee do nothing to impair the value of the lease to the lessor," referring to oil and gas lease such as involved herein.

5. The decision of the Circuit Court of Appeals in this case is directly contradictory of the decision of the Circuit Court of Appeals in *Gilbreath* v. *States Oil Co.*, 4 Fed. (2) 232-235, wherein the court holds that the producer would be receiving a very valuable product without giving anything in return therefor, and would not allow it.

6. The decision of the Circuit Court of Appeals in this case is directly contradictory of all decisions of all the courts which hold that the owner of property must be compensated for the loss of his property, destroyed by another without his consent.

7. The decision of the Circuit Court of Appeals in this case is directly contradictory of the decision of the Supreme Court of Illinois in *Daughetee* v. *Ohio Oil Co.*, 263 Ill. 518-527, wherein that court, in establishing a rule of property decided that the producer must produce the gas in order that the owner can realize on the value of this product.

8. The decision of the Circuit Court of Appeals in this case is directly contradictory of the decision of the Circuit Court of Appeals in *Gilbreath* v. *States Oil Co.*, 4 Fed (2) 232, wherein that court holds that where property is destroyed the owner must be compensated.

9. Under our constitution the Government of the United States cannot destroy property "without just compensation". The decision of the Circuit Court of

Appeals in this case gives a private corporation greater power in that respect than the federal government possesses, which was never intended by our lawmakers or our courts.

10. A very important question of law is involved in this suit, *viz.*: Can the oil producer destroy the property of another without payment therefor, regardless of the reason for, or the excuse for such destruction, where the owner had no voice or power and was not consulted about it.

11. The decision of the Circuit Court of Appeals in this case has so far departed from the accepted and usual course of judicial proceedings and has sanctioned such a departure in the lower court from the accepted law of this country, particularly the law of damages, as to call for the exercise of this court's power of supervision.

12. The decision of the Circuit Court of Appeals in this case is directly contradictory of the decision of the Supreme Court in *Ludey* v. *Pure Oil Co.*, 11 Pac. (2) 102, wherein that court holds that the producer is a trustee for his co-tenant to the extent of the interest of his co-tenant of such property and must account for it to his co-tenant.

13. By the decision of the Circuit Court of Appeals in this case, the plaintiff is deprived of property valued at $112,454.57 without any compensation of any kind therefor. The defendant had exclusive possession, with exclusive control, the plaintiff had no power or authority in the matter and never consented to the destruction. If such can be done, in complete negation of the law of damages as universally understood, the question of law is so very important that this court should finally enunci-

ate the principle, if such is the principle of law accepted by our courts.

Wherefore, your petitioner, Peter L. Guth, plaintiff below, respectfully asks that the prayer for a writ of *certiorari* to the United States Circuit Court of Appeals for the Seventh Circuit be granted and that this Court proceed as provided by law and the rules of this Court in such cases, and upon a final hearing the judgment of the United States Circuit Court of Appeals for the Seventh Circuit be reversed, with directions to reverse the judgment below and enter a decree in favor of the plaintiff for the sum so due your petitioner herein.

Respectfully submitted,

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## AUTHORITIES.

### I.

**Where property is destroyed the owner must be compensated.**

*Ohio Oil Co.* v. *Indiana,* 177 U. S. 190.

*Wemple* v. *Producers Oil Co.,* 145 La. 1031.

*Mathes* v. *Shaw Oil Co.,* 101 Pac. 998.

and many other cases.

### II.

**Lessee is a trustee to the extent of the interest of the cotenant which he holds, whether wrongfully, or by consent.**

*Ludey* v. *Pure Oil Co.,* 11 Pac. (2) 102-104.

*Rice* v. *Peters,* 128 App. Div. (N. Y.) 776-778.

*Merrit Oil Co.* v. *Young,* 43 Fed. (2) 27-31.

and other cases.

### III.

**Trustee is responsible for the property of the trust.**

*Silver King Coalition Mines Co.* v. *Conkling Min. Co.,* 255 Fed. 740.

*Dixmoor Golf Club* v. *Evans,* 325 Ill. 612-625.

*Story Parchment Co.* v. *Patterson Parchment Paper Co.,* 282 U. S. 555.

**IV.**

**Trustee must account for trust property; it is not necessary for the cestui que trust to show that there is anything due; trustee must affirmatively prove its innocence and care. All doubts are resolved in favor of cestui que trust.**

*Biddle Purchasing Co.* v. *Snyder,* 96 N. Y. S. 356.

*Knowlton* v. *Fourth-Atlantic Bank,* 271 Mass. 343-350.

*Axel E. Johnson* v. *Kansas Natural Gas Co.,* 90 Kan. 565-580.

and other cases.

**V.**

**Plaintiff was the owner of his proportionate share of the gas and oil under the premises.**

*Jilek* v. *Chicago, Wilmington & Franklin Coal Co.,* 282 Ill. 241-248.

**VI.**

**The lessee agreed to produce all the oil and gas under the premises, in order that the owner could realize on the value of those products.**

*Daughetee* v. *Ohio Oil Co.,* 263 Ill. 518-527.

**VII.**

**There is an implied covenant to produce, save, and market the gas at market value.**

*Pritchard* v. *Freeland Oil Co.,* 80 W. Va. 787-789.

*George* v. *Curtain*, 108 Okla. 281-282.

*Peoples Gas Co.* v. *Dean*, 193 Fed. 938-944.

and other cases.

**VIII.**

**Lessee must pay for all products, else he would get something for nothing.**

*Wemple* v. *Producers Oil Co.*, 145 La. 1031-1045.

*Gilbreath* v. *States Oil Co.*, 4 Fed. (2) 232-235.

*Carroll Gas & Oil Co.* v. *Skaggs*, 231 Ky. 284-291.

and other cases.

**IX.**

**Damages may be recovered for the destruction of gas.**

*Ohio Oil Co.* v. *Indiana*, 177 U. S. 190-204.

**X.**

**Tenant in common taking oil or gas—a part of the freehold, must account.**

*Silver King Coalition Mines Co.* v. *Conkling Min. Co.*, 255 Fed. 740-743.

Bogert on Trusts, Vol. 3, Sec. 582.

**XI.**

**Failure to find a market, no defense.**

*Pritchard* v. *Freeland Oil Co.*, 80 W. Va. 787-790.

**XII.**

**The defendant must account for all the gas belonging to the plaintiff, which has come into its possession, by paying him his royalty therefor.**

*Guth* v. *Texas Co.,* 155 Fed. (2) 563-566.

*Gilbreath* v. *States Oil Co.,* 4 Fed. (2) 232-235.

*Benedum-Trees Oil Co.* v. *Davis,* 107 Fed. (2) 981, 985.

and many other cases.

**XIII.**

**Payment to plaintiff for gas processed, established a value for all the gas produced.**

**XIV.**

**Where one saves money at the risk of injuring others, it brings liability with it.**

*Welsh* v. *Kerr,* 233 Pa. 341-344.

*Jennings* v. *Southern Carbon Co.,* 80 S. E. 368-370.

*Ohio Oil Co.* v. *Indiana,* 177 U. S. 190.

**XV.**

**Gas recovered with oil is an additional product, for which the owner should be paid.**

*Gilbreath* v. *States Oil Co.,* 4 Fed. (2) 232-235.

*Twin Hills Gasoline Co.* v. *Bradford Oil Corp.,* 264 Fed. 440-441.

*Wemple* v. *Producers Oil Co.,* 145 La. 1031-1045.

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## BRIEF

As stated, the plaintiff was the owner of a proportionate share of the gas, gasoline and oil, under two farms in Marion County, Illinois. The defendant, under the ordinary form of oil and gas leases operated on the farms and produced a large amount of oil and gas. The oil was dismissed out of the case without prejudice. Of the gas, a small portion was processed by the defendant and accounted for, leaving as the issue in this case, the remainder of the gas which was produced and burned, without payment therefor. Under the leases the defend-

ant was in exclusive possession and control of the farms insofar as necessary in the production of oil and gas, and the plaintiff had no power or authority whatsoever.

When the wells were drilled and oil found, it entered the pipes of the defendant, whence it was conducted to the "separator" of the defendant—a huge drum employed to separate the gas from the oil. The oil was conducted to "tank batteries" for storage and shipment. About 2% of the gas was processed by the defendant, for which plaintiff was paid for his share, an average of .035 per thousand cubic feet. The remainder was conducted through "flare pipes" and burned, without payment therefor. Those flares continued twenty-four hours per day, to a height of fifty and sixty feet. A fifty foot flare consumed about 1,424,000 cubic feet per day and a sixty foot flare consumed approximately 1,693,000 cubic feet per day—a large amount in the aggregate, in other words, $59.25 per day, from each well.

The court says: "One cannot be said to possess something which he cannot by force of circumstances contain or control." The defendant did contain it in their separator and they also controlled it in that separator and in the pipes, otherwise there would have been catastrophe. The defendant never so much as suggested that they could not control it, nor that they could not contain it. The defense was that it could not economically process it and had no place where it could be stored, precisely what the Ohio Oil Co. claimed in the case cited. The statement is untrue, because it could have put it back into the formation. The court apparently never considered that part of defendant's duty, at least, there is no reason given in the opinion why the defendant should not have put it back into the formation and saved it, which, with the very shallow formation and the very

low pressure, could have been done at very low expense. It is difficult for us to understand why the defendant was not in possession of that gas from any angle. Just what sort of possession the Circuit Court of Appeals had in mind, we cannot understand, since the defendant had absolute and exclusive control of the gas within its own separator.

Defendant's expert witness testified that it could have been processed, or it could have been put back into the formation, which would produce new energy and more oil. (R. 163). Defendant insisted that there was no market, but in each instance qualified the statement by adding "in its raw state". He testified further that The Sunflower Co. bought casinghead gas (the gas here involved) and paid for it. Another witness, the defendant's superintendent, testified that The Sunflower Co. and the Warrenton Petroleum Co., were extracting liquid hydrocarbons from casinghead gas, such as here involved, from the same pool (R. 102).

The issue in the case seems simple and narrow. The plaintiff's contention is, that the defendant cannot destroy plaintiff's property, without the consent of plaintiff, which was never obtained in this matter, without compensating plaintiff, regardless of any excuses or necessities, where such property is in the sole and exclusive possession and control of the defendant, and plaintiff had nothing to do with the destruction, nor could he have. Plaintiff's answer to defendant's contention is, that if defendant could not economically process the gas, some other producer might, and defendant should have withdrawn from the farms and given up the leases, if it did not want to take the burdens with the profits.

Defendant's contention is, that where it may be uneconomic, or expensive to process the gas so produced,

and a state statute commands destruction of all gas *not utilized,* the defendant may destroy such property, rather than process it or put it back into the formation, and under such circumstances it will not be liable to the plaintiff. In other words, to avoid a loss on its part, it can charge the loss to the owner of the raw material, who has no power or authority in the matter and has never been consulted. The Circuit Court of Appeals upholds the latter contention. If this position is maintained, it will be an absolute negation of the law of damages, and the plaintiff will be robbed of his property valued at $112,454.57, with complete sanction of the courts.

Boiled down and stripped of all adjectives, the contentions set forth in the two preceding paragraphs, are the contentions of the parties in this case. The defendant paid the plaintiff .035 per thousand cubic feet for his portion of the gas processed, about 2% of the gas produced. It charges the loss of the other approximate 98% to the owner, who had no authority, possession, power or voice in the unnecessary destruction of his property by another. The gas was in a safe place, the defendant, in the course of production, caused it to become unsafe, by bringing it to the surface and refused to either process it or put it back into the formation where it would be absolutely safe, in order to save money for the defendant, at the expense of the plaintiff who had nothing to do with it, nor could he.

If the defendant can refuse to utilize the gas produced and burn it to save the expense of preparation to market, it can likewise destroy such of the oil as it does not care to prepare for market, and thus render the contract a *nudum pactum* insofar as the defendant is concerned, at the expense of the owner. It seems that both parties

should be held equally bound. The Circuit Court of Appeals, in effect, held the contrary.

To avoid loss and liability, four courses were open to the defendant:

1. It could process the gas, pay the plaintiff his royalty and put the residue back into the formation to be marketed in the future.

2. It could put all the gas not processed back into the formation.

3. It could pay the plaintiff his royalty on the gas produced, as decided by the Circuit Court of Appeals in the second appeal, and charge the cost to the product as a cost of production, in accordance with accepted rules of auditing, if it was in fact necessary to burn it (which it was not).

4. It could, under the decision of the Supreme Court in *Ohio Oil Co.* v. *Indiana,* 177 U. S. 190, obtain an injunction against competitors against waste, which would allow the defendant to produce in a manner to enable it to utilize all products, including gas.

The defendant repeatedly insisted that the gas was worthless in its raw state. If we accept that basis of valuation, iron is worthless before mining; the tree before it is cut down and in lengths; the grain in the field prior to reaping and threshing. Every raw material is worthless in its raw state, until we prepare it by reducing it to such condition as would enable us to market it. Such a valuation would have to be arbitrary and would never be accepted by its owner, and should not be. It is worth the market, less the cost of production according to all accepted theories of auditing.

In the court below the defendant took the position that it was liable only for such property as was specifically mentioned in the lease and covered therein, leaving it, inferentially, at liberty to destroy any and all other property coming into its hands, without liability. The Circuit Court of Appeals sanctioned such construction.

The Circuit Court of Appeals, in its opinion says: "The plaintiff is the owner of one thirty-second of the royalty *which the defendant agreed to pay for oil and gas to be taken from certain lands,* pursuant to leases thereon" (Italics ours). The plaintiff is only asking that the defendant do that very thing. But the defendant has burned about 98% of the gas taken from those lands and refused to pay the royalty. And the Circuit Court upholds that refusal to pay, *contrary to the contract, as construed by the court.* The court discusses the question whether it would be profitable or not, for the defendant to do certain things, *not mentioned in the lease,* and excuses payment based thereon. If defendant's profits determine the question of liability of defendant for the intentional destruction of plaintiff's property, which was unnecessary, then, while we may have law, we have no justice.

The time at which the processing plant was erected has nothing to do with the matter. That plant was in operation within two months, and the flares continued for years afterward. During the two months only an inconsequential amount of gas was burned. The defendant tried to create the impression that only that gas was being sued for, which was not true. The Circuit Court of Appeals, after admitting that the gas was in the defendant's pipes and in its separators, goes on to say: "We cannot agree that this was such possession as would make the defendant liable. One cannot be said to possess

something which he cannot by force of circumstances contain or control." In the first place, the defendant never claimed that it could not contain or control it, because such a claim would have been silly, when the defendant had it contained and controlled at all times, to prevent a catastrophe. We confess that we are at a loss to understand the meaning of the Circuit Court of Appeals in that statement. Did it mean that the defendant must have it in some special sort of container, other than their separator and pipes? As we understand the word from the dictionary, possession means "the having, holding or detention of property." The defendant certainly had it, held it and detained it, otherwise the safety department of the State would have been interested. The court says nothing about the fact that the defendant could have put it back into the formation. But assuming that the defendant did not have the gas in some special container, not designated by the court, is that a reason for charging the plaintiff, who owned the property, who had no voice or connection with the unnecessary destruction with the loss? That is the only reason advanced by the Circuit Court of Appeals for so charging the loss, aside from the ground that the defendant could make no profit on processing, if the Court's guess is right on that question. With highest respect for that court, we must insist that the position is not tenable, consistent with justice, or the sacred right of ownership of property. The constitution prohibits the government "destruction of property without just compensation". The Circuit Court of Appeals gives this private corporation a greater right than the government has.

With reference to putting the gas back into the formation, the KMA pool in Texas returns gas at the rate of 9,500,000 cubic feet per day; Villa Platte in Louisiana,

100,000,000 cubic feet per day; Cotton Valley in Louisiana, 150,000,000 cubic feet per day; Tepetate in Louisiana has returned 32,000,000,000 cubic feet; Cook Ranch pool in Texas, 21,305,244,000 cubic feet produced from the pool and 7,916,097,000 cubic feet purchased outside. Not a cubic foot of gas was burned by any of the above to get rid of it. Salem field, here involved, is from 1800 to 3500 feet in depth, with a pressure of 360 to 466 pounds. Tepetate field has a depth of 8254 feet and a pressure of 3640 pounds; Paloma field in California, 11,000 feet and a pressure of 2200 to 3000 pounds; Gloria field in Texas, 7560 feet, 2800 pounds and returns 225,000,000 cubic feet daily, and as stated, every foot is returned to those formations. It is to be remarked, that it is far more expensive to return gas to the very great depths, and exceedingly high pressures, than it would be to the shallow formation with the low pressures in Salem pool, consequently, the statement of defendant that it had no way of storing it, should be rejected.

Defendant's statement that the gas was worthless in its raw state, should likewise be disregarded. It paid .035 per thousand cubic feet for the same gas in its raw state from the same pipes, and the lease provides for the payment of "a royalty of one-eighth of the market value at the mouth of the well", which is likewise in its raw state. The Circuit Court of Appeals did not go into the question of value of the property at all, notwithstanding that the plaintiff showed it to be worth $112,454.57.

The Circuit Court of Appeals, in its opinion, adopts the reasoning of the defendant, to the effect, that if the defendant cannot economically process or take care of the gas, the owner of the raw material must stand the loss, notwithstanding that the lease contains no such

provision, limitation, or condition, and no consent to the destruction is shown, where plaintiff has no power, authority or control thereof, in fact has no connection whatever with the production or destruction of his property involved, valued at $112,454.57. If such is the case, with due respect for the Circuit Court of Appeals, there is not much left of the law of damages, as heretofore promulgated.

It would seem that the producer, expert in that line, when it took the leases, would take with it the chances, as was held in *Palmer* v. *Truby,* 136 Pa. 556-564, where the court said: "As before observed, it was a speculation pure and simple, in which the lessee took all the risk. They did so for the chance of getting seven-eighths of the oil.", in the production, saving and caring for the property, as promised in the provision of the lease to "produce, save and take care of said products." Burning the gas at the expense of the owner, is not "taking care of it." Nor should that be charged to the owner who had nothing to do with it, nor could he. Nor would that seem to give the court authority to saddle the owner with the loss that might occur to the defendant under the contract, unless we completely disregard the dictates of justice, and all the decisions heretofore rendered by the courts under similar circumstances. The court, in *Stanolind Oil & Gas Co.* v. *Kimmel,* 68 Fed. (2) 520, held squarely to the contrary and in line with the *Palmer* case decision, quoted above.

To approach the question from another angle, which we consider as the true and logical angle, property belonging to the plaintiff came into the hands and under the exclusive control of the defendant. It is impossible to call that anything other than a trust. As such trustee the defendant must account to the owner for property

coming into its hands and under its control. If we suppose that, instead of the gas, $112,454.57 in paper money, belonging to the plaintiff came into the hands of the defendant, with power of disposition and control, it would be inane to say that the defendant could burn it, because, it would be uneconomical to build a vault to care for it, yet the principle involved is identical with that involved here.

Approach the facts in the case and the decision of the Circuit Court of Appeals thereon, from any angle or point of view, and the plaintiff loses property of the value of $112,454.57, by reason of the intentional and unnecessary destruction of it on the part of another, who has exclusive and absolute control thereof, with no power, authority, or connection therewith by the owner, solely to save money for the other, contrary to the positive provisions of the leases, a concept which is totally foreign to our processes of justice and our laws covering the question of damages.

## CONCLUSION.

We respectfully insist that, where property is burned by another, without consent of the owner, and where the owner has not and cannot have any connection with such property, or its destruction, and has no authority or power of control of such property, which is in the possession of another, such owner must be compensated under our law, and no excuse or necessity of such destroyer can deprive such owner of his right of compensation. No decision of any court in this country, other

than the decision in this case, can be found holding contrary to our statement of such right as set forth above.

The defendant has no legal defense. When they burned this gas, they relied on the ignorance of the plaintiff regarding his rights and his inability to prove the measure of damages, to protect them from loss, by reason of the fact that all the evidence is in the possession of the defendant, and is not obtainable otherwise, or from any other source. It does not exist otherwise. The defendant gambled that no lawyer could, or would unearth that evidence.

And, as a consequence, we respectfully pray, that a writ of *certiorari* be granted, and that this Court proceed as provided by law and the rules of this Court in such cases, and upon final hearing the judgment of the United States Circuit Court of Appeals for the Seventh Circuit be reversed, with directions to that court to reverse the judgment below, with directions to that court to enter a decree in favor of the plaintiff for the sum so due your petitioner herein.

PETER L. GUTH,

By ALBERT H. FRY,
His Attorney,
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Chicago, Illinois.

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1947.

No. 456

PETER J. GUTH,
Petitioner,

vs.

THE TEXAS COMPANY,
Respondent.

## ANSWER AND BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1947.

## No. 450

PETER L. GUTH,
Petitioner,

vs.

THE TEXAS COMPANY,
Respondent.

## ANSWER AND BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The petition in this case proceeds upon the theory that the findings of fact made by the District Court were all wrong; also that the conclusions of law made by the District Court and the facts and conclusions in the opinion of the Circuit Court of Appeals were wrong.

Yet the petition contains no reference whatever to any evidence in the record, either inconsistent with or contradictory of any finding of fact or conclusion of law.

The first finding of fact made by the District Court recites that

"upon the underlying facts in this cause there is really no conflicting evidence."

The findings of fact made by the District Court, appearing in the transcript of record pages 185 to 190, presents a complete answer to all the contentions made in the petition for certiorari filed in this case.

In brief, petitioner in this case is seeking to re-argue to this Court matters of fact which have been adjudicated against him in the trial court and affirmed by the Circuit Court of Appeals. Although the determinations of fact against him were amply supported by the evidence, he is, in effect, asking this Court to review or to re-try the facts. Why he thinks that the Court should depart from its established rule not to put itself in the position of a trier of facts where there is any evidence to support the results reached in the trial court, is not explained. Yet that seems to be the sole object of this attempted appeal; for under the facts as found against him and under the well-established principles of law applicable thereto, the decision of the District Court and the affirmance by the Circuit Court of Appeals are fully sustained by the record.

It is, perhaps, the acme of understatement to say that the petitioner is reckless in his assertions of fact! To read the petition one would get the impression that respondent had abused petitioner by deliberately and wilfully destroying great quantities of valuable casinghead gas which could have been utilized or marketed in some mysterious but undisclosed way. Yet no evidence is pointed out and no place in the record is cited to support these wild claims!

When the record and the evidence are examined it is found that respondent conducted its operations with all diligence, prudence and care, doing what was necessary

and proper to operate its oil and gas leases efficiently, so that the products therefrom which could be saved and utilized would produce the greatest possible return for all interested parties—the petitioner and other royalty owners as well as the lessee. Instead of employing dilatory practices, it appears (and the trial court so found) that the respondent moved with all speed and at great expense to itself to construct a gasoline plant for the utilization of the casinghead gas, and that at the earliest possible time the gas was processed and petitioner was fully paid all sums due him as royalties thereon. What then, becomes of petitioner's claim that respondent failed to account to him for royalties on such gas?

It is, of course, uneconomical and unfeasible to construct large casinghead gasoline plants, at enormous expense, before the gas is known to be available, and no oil company could long continue in business if it engaged in such foolhardy practices. But the evidence in this case shows, and the trial court found, that respondent moved with all diligence and dispatch to build its plant and to utilize the gas, once its presence was proven.

As an example of petitioner's disposition to "make the wish father to the thought" in his extravagant claims of facts, we call attention to the first full paragraph on page 4 of the petition, contained under the heading which petitioner is pleased to designate "Salient Facts". In this one paragraph petitioner makes several assertions which are wholly unjustified. In the first place he states that respondent "refused" to prepare the product for market "on the alleged ground that it would be uneconomic to build a processing plant large enough to process it." In opposition to this the evidence shows that the respondent not only did not "refuse" to build such

a plant, but actually did build it and did utilize the casing-head gas at the earliest possible time!

Again, in the same paragraph petitioner, in speaking of the gas which could not be marketed or utilized prior to the construction of the plant, says: "No reason was given for not putting it back into the formation". Yet the record shows and the trial court so found that perfectly sound and convincing reasons existed for not putting the gas back into the formation, and that to do so would have brought financial loss to petitioner and respondent alike (see pages 163-164 of Transcript, and particularly the portion hereinafter quoted).

After all, what petitioner is here attempting to do is to have this Court set aside the findings of fact made below, even though such findings are uncontradicted in their entirety and are amply supported by the evidence, and to make new findings to support petitioner's somewhat fantastic theories! This it is neither the disposition nor the province of this Court to do.

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On appeal, petitioner in the Circuit Court of Appeals, in his points relied on for reversal (Tr. pp. 193-194), made no complaint of any of the findings of fact made and entered by the District Court. The only claim made by petitioner concerning the evidence in the case, in the points relied on for reversal in the Circuit Court of Appeals, was the one numbered 10, which alleged error in the refusal of the District Court to admit as competent evidence certain computations made by the attorney for the plaintiff (attorney for the petitioner here).

Those computations appear in the transcript of the record, pages 129 to 147, inclusive. That was a document prepared by petitioner's attorney, based on a pur-

ported formula for computing the flow of gas in a pipe line; but the trouble with the computation was that it assumed a false premise as the foundation for the computation. In any event, it was nothing more or less than the argument of counsel, and the District Court very properly held that it was not competent evidence. However, the Court permitted it to be marked for identification and filed with the Clerk as a part of the argument.

An examination of the document reveals the erroneous basis on which petitioner's counsel had made his calculations by using pressures in the oil and gas separator, instead of pressures in the flare line.

The District Court permitted counsel for respondent, as a part of their argument, to file the exhibit which appears at pages 174 to 176 of the transcript of the record. In that document, the erroneous assumptions of petitioner's counsel were pointed out; and as there demonstrated to the Court, the claims of petitioner's counsel about the amount of the gas which had escaped at the casinghead and been flared, were wild, extravagant, absurd, and utterly ridiculous. As stated in that document, based on the evidence in the record,

> "that in any event the amount involved in this lawsuit concerning gas is less than $300, as against the plaintiff's claim of $112,000."

Yet, by this petition for certiorari filed herein, plaintiff's counsel still talks about a value of $112,000 for the gas that was burned; when, as a matter of fact, it would not amount to as much as $300, if there had been any market for it, which there was not, and even if it could have been processed and any value could have been thereby created for it.

Petitioner's counsel argues in his petition that regardless of the fact there was no market for the gas, it could

have been put back in the ground. Petitioner's argument and theory in that regard wholly ignores the positive and uncontradicted evidence at pages 163-164 of the transcript of the record on that very question, where it was proven if this casinghead gas in its raw state had been put back in the leasehold, through an in-put well,

> "With the offset wells to the Chapman and Shereshovech leases producing as they were producing, and they produced wide open, to put repressured gas back in the reservoir of either or both of those leases, would have forced a large amount of oil from under the Chapman and Shereshovech across the boundary line, to be captured by offsetting and adjoining wells."

In other words, the use of casinghead gas for repressuring would have operated to reduce the amount of oil recovered from the leases in question, and resulted in direct loss and damage to the petitioner.

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The rights of the parties in interest in this case, petitioner and respondent, are fixed and determined by the terms of the oil and gas leases (Tr. of Rec. pp. 7-15), under which petitioner owns 1/32nd royalty interests. The other three fractional royalty interests are owned by various individuals not parties to this suit, and the 28/32nds working interest is owned by respondent. Therefore, the interest of the respondent to recover and save any value from the casinghead gas was twenty-seven times as great as that of the petitioner. For every dollar that petitioner might realize from the recovery and saving of either oil or gas, respondent would recover and realize $27.00. That fact explains why respondent did everything that was humanly possible to so operate the leases in question as to produce the largest possible

realization. The positive and undisputed evidence shows that the leases were so operated by respondent as to produce and save the highest possible amount of oil and gas under the surface of the land described in the leases.

Numerous oil wells had been drilled on lands immediately adjoining the two leases in which petitioner had his 1/32nd royalty interest, and those wells were being operated to capacity. It therefore became and was necessary for respondent to drill offset wells on the leases in question (known as the Shereshovech and Chapman leases), and to operate these offset wells in the same manner that wells were being operated on adjoining lands; otherwise, oil and gas underlying the Shereshovech and Chapman leases would have been drained to the wells drilled and operated on adjoining tracts.

The really valuable property right in this oil field was in the recovery of oil from the underlying oil-bearing strata. There were no wells "where gas only was found." This oil field was what is commonly known as a "gas expansion field"; that is, there was gas intermingled with the oil in the producing strata; it was impossible to produce the oil without gas escaping at the casinghead of the well; such gas is known and defined as "casinghead gas"; its principal use and value was as a propelling agency for the production of oil from the wells; it came to the casinghead intermixed with the oil, was carried to separators where the gas was separated from the oil, and passed to flares required to be operated by the laws of the State of Illinois to prevent explosions and disasters in the oil field.

This casinghead gas is what is commonly called "wet gas"; that is, it contains varying amounts of heavy hydrocarbons, very inflammable and highly explosive, and Illinois state law very properly required that it be flared

and not allowed to escape in its raw state into the atmosphere. This casinghead gas had no value in its raw state; but in the evolution of the art, means had been found by the construction and operation of very expensive processing plants to pipe the casinghead gas to such plants and there extract from it protane, butane, gasoline, and other hydro-carbons. The residue, after extracting the heavy hydro-carbons, was fit for commercial use, provided a market be found for it.

After the oil field in southern Illinois was discovered and oil wells were drilled on the leases here involved, only one of two methods or policies could be followed, until a processing plant could be constructed and put into operation, *viz.:*

(a) to close down the oil wells and stop production therein, and thereby allow the oil to be drained from the lease to oil wells on adjoining lands; or

(b) to separate the casinghead gas from the oil and burn the casinghead gas in flares in obedience to state law, until a processing plant could be constructed and put into operation to which the casinghead gas could be piped from the producing wells in the field for processing.

The uncontradicted proof is that with the utmost diligence and within the shortest possible time, respondent built a processing plant and gathering lines, at a cost of approximately two and a half million dollars, and thereafter processed the casinghead gas from the two leases in question and from other leases in the field, and thus created some value for it; and until which time it was flared and burned in obedience to state law.

Petitioner bases his whole claim in this case on an alleged right to recover for 1/32nd part of the casinghead gas that escaped from the wells on the leases in which

he had a 1/32nd royalty interest before the respondent's processing plant was built and put in operation, and which, during that brief period, was necessarily flared in order to keep the oil wells in operation; yet he admits that the raw casinghead gas that was so flared during that brief period was unfit for commercial use, and there was no market for it.

Petitioner entirely ignores the only provision of the leases under which any liability could possibly arise against the respondent to pay for casinghead gas, *viz.*, "Paragraph numbered 3rd" of the covenants of the lessee, respondent herein, which reads as follows:

> "3rd. To pay lessor for any gas produced from any oil well *and used off the premises or in the manufacture of gasoline or any other product* a royalty of one-eighth (1/8) of the market value at the mouth of the well payable monthly at the prevailing market rate" (Tr. of Rec., p. 8).

And petitioner admits that respondent paid him for his *pro rata* share of all the casinghead gas that was gathered from the leases in which he held 1/32nd royalty interests, and which was processed and any value whatever created for it

Not only does the petition for certiorari in this case incorrecty and erroneously assume facts flatly contradictory to the facts established by the evidence in the case, but petitioner also asserts legal propositions wholly at variance with the principles and rules of law established and applied in decisions of the courts below. Petitioner's counsel repeatedly cites the decision of this Court in the case of

*Ohio Oil Company* v. *Indiana*, 177 U. S. 190,

as authority for various legal propositions advanced by him. He ignores the fact that the *Ohio Oil* case involved

solely the question of the validity of the statute of the State of Indiana, which was attacked on constitutional grounds, but which the Court held was not unconstitutional. The decision of this Court in the *Ohio Oil* case has absolutely no application to the situation or the facts involved in the case here sought to be reviewed.

The petitioner assumes that under the law, he was the owner of the gas which escaped at the casinghead of the well and was flared for a time, and that was subsequently processed. The law in Illinois is exactly to the contrary.

## BRIEF AND PROPOSITIONS OF LAW.

The propositions of law advanced by the petitioner, so far as they relate to the issues involved in this case, are in direct conflict with the settled law as pronounced and laid down by the decisions of the Illinois state courts.

### I.

Petitioner's assumption that he was the owner of any gas that was flared is entirely erroneous.

The casinghead gas escaping from the oil wells drilled on the leases in question did not belong to the plaintiff, appellant; he had no title whatever thereto; it was the sole property of the lessee, appellee. It was so expressly held by the Circuit Court of Appeals in a former appeal from a judgment on the pleadings.

*Watford Oil & Gas Co.* v. *Shipman,* 233 Ill. 9;

*Union Oil Co.* v. *Mutual Oil Co.,* 65 Pac. 2d 896; op. 899;

*Western Oil and Refining Co.* v. *Venago Oil Corp.,* 24 Pac. 2d 971, op. 973;

*Guth* v. *Texas Co.,* 115 Fed. 2d 563, op. 566, par. (5).

Par. "3rd" of the Chapman and Shereshovech leases involved herein (Tr. 8 and 12).

### II.

Oil and gas in place, by reason of their fugacious character, belong to the owner of the land only so long as they remain under the land; if the owner makes a grant of

them by lease to another, it is a grant only of the oil and gas the grantee (lessee) may take from the land, and the title vests in the grantee to the oil and gas that is actually recovered.

*Triger* v. *Carter Oil Co.*, 372 Ill. 182; op. 185, and cases there cited.

## III.

It is immaterial whether the grant of the right to explore for and recover oil and gas is by deed or by lease; in either case, the title to the oil or gas actually recovered passes to the grantee or lessee as the case may be.

*Jilek* v. *C. W. & F. Coal Co.*, 382 Ill. 241, op. 246, *et seq.;*

*Gray-Mellon Oil Co.* v. *Fairchild* (Ky.), 292 S. W. 743;

Ill. Rev. Stat. (1945), Chap. 94, Sec. 6, which reads as follows:

"Any mining right, or the right to dig for or obtain iron, lead, copper, coal, or other minerals from land, may be conveyed by *deed or lease,* which may be acknowledged and recorded in the same manner and with the effect as deeds and leases of real estate."

## IV.

The laws of Illinois require that all gas produced from oil wells that is not utilized shall be burned at a safe distance from the well.

Rule D-14, entitled Surplus Gas Disposal, promulgated by the Department of Mines and Minerals, Division of Oil and Gas Conservation, under authority of the provisions of Sec. 67, Chap. 104, Ill. Rev. Stat. (1945), which reads as follows:

> "Rule D-14. Surplus Gas Disposal. All gas produced from operations of oil wells that is not utilized shall be burned at a safe distance from any well, storage tank, building, or inflammable materials, as may be determined by the Department."

Under the provisions of the Criminal Code of the State of Illinois, it is unlawful to keep, store, transport, sell or use crude petroleum, gasoline or other volatile combustibles in such manner or under such circumstances as will jeopardize life or property.

Ill. Rev. Stat. (1945), Chap. 38, Criminal Code, Sec. 351.

Under the State Fire Marshal Act of the State of Illinois, the lessee was prohibited from retaining on the leased premises inflammable and explosive casinghead gas escaping from producing oil wells.

Ill. Rev. Stat. (1945), Chap. 127½, Sec. 9.

## V.

Gas escaping from an oil well in a gas expansion field, in the production of the oil, is known as "wet gas" or "casinghead gas". It is without value and there is no market for it, except to a processing plant built and operated to extract from it the heavy hydro-carbons, gasoline, butane, etc. Being unfit and dangerous for use in its raw state, it is of an entirely different character than gas produced from a well where only gas is found and produced; it was not within nor covered by the "2nd" clause of the oil and gas leases involved in this case; but only by the "3rd" clause of said leases, which contains all of the covenants of the lessee with respect to "gas produced from any oil well", that is, "casing-head gas" or "wet gas".

*Hein* v. *Shell Oil Co.*, 315 Ill. App. 297;

*Tucker* v. *Carter Oil Co.*, 315 Ill. App. 264;

*Ludey* v. *Pure Oil Co.*, 11 Pac. 2d 102.

## VI.

Casinghead gas, which is gas produced from an oil well in a gas expansion reservoir, is neither oil nor gas within the provisions of Paragraphs "1st" or "2nd" of the oil and gas leases involved in this case.

*Hammett Oil Co.* v. *Gypsy Oil Co.*, 218 Pac. 501;

*Broswood Oil Co.* v. *Sand Springs Home*, 62 Pac. 2d 1004.

## VII.

There is no fiduciary or trust relationship created between the lessor and the lessee by an oil and gas lease.

*O'Donnell* v. *Snowden & McSweeney Co.*, 318 Ill. 374, op. 378;

*Hein* v. *Shell Oil Co.*, 315 Ill. App. 297, op. 300;

*Colgan* v. *Forest Oil Co.*, 45 Atl. (Pa.) 119, op. 120;

*Cooper* v. *Ohio Oil Co.*, 25 Fed. Supp. 304, op. 309.

## VIII.

"A contract between parties dealing in oil and gas is subject to the same rules of interpretation as any other contract."

*O'Donnell* v. *Snowden & McSweeney Co.*, 318 Ill. 374, op. 379;

*Hammett Oil Co.* v. *Gypsy Oil Co.*, 218 Pac. 501.

## IX.

It is the settled law in Illinois that the lessor and lessee in an oil and gas lease are *not* tenants in common, each with the other.

*Watford Oil & Gas Co.* v. *Shipman,* 233 Ill. 9;
*Conover* v. *Parker,* 305 Ill. 292;
*Triger* v. *Carter Oil Co.,* 372 Ill. 182;
*Jilek* v. *C. W. & F. Coal Co.,* 382 Ill. 241.

## X.

It was absolutely necessary for respondent to drill wells offsetting wells drilled and put into production on lands adjoining the leases in question, in order to prevent the oil under the leases in which petitioner was interested being drained by the wells on adjoining tracts.

> "Because of the fluidity of oil and gas, and the likelihood of their being withdrawn from the demised land by the operation of wells on adjoining lands, the courts uniformly hold that, in the absence of an express covenant in the lease creating a duty in the lessee to drill wells offsetting those on adjoining lands from which oil and gas are produced in paying quantities, the law implies such a duty."

Summers Oil & Gas, Permanent Edition, Vol 2, Sec. 399, p. 338;

Annotation in 19 A. L. R. 437; also

Annotation in 60 A. L. R. 259;

*Powers* v. *Bridgeport Oil Co.,* 238 Ill. 397;

*Union Gas and Oil Co.* v. *Diles,* 254 S. W. 205;

*Allegheny Oil Co.* v. *Snyder,* 106 Fed. (C. C. A. 6th) 764.

## SUMMARY AND CONCLUSION.

The findings of fact made by the District Court are fully supported by the evidence in the case. There was no evidence upon which any other conclusion as to the facts could be reached. The conclusions of law made by the District Court were sound and correct, and fully supported by the decisions of the Supreme Court of the State of Illinois.

The District Court's findings of fact, conclusions of law, and judgment were affirmed by the decision of the Circuit Court of Appeals, and there is no basis upon which any contrary conclusion could be reached by further review of the cause.

We therefore respectfully submit that the petition for certiorari filed herein should be denied.

Respectfully submitted,

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ENOS L. PHILLIPS,
HAROLD A. SMITH,
Attorneys for The Texas Company,
Respondent.

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1947.

## No. 450

PETER L. GUTH,
Petitioner,

vs.

THE TEXAS COMPANY,
Respondent.

## REPLY OF PETITIONER TO ANSWER OF RESPONDENT.

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## No. 450

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## REPLY OF PETITIONER TO ANSWER OF RESPONDENT.

Counsel for Respondent make some statements which call for answer and comment. For instance, at the bottom of page 3 they say: "In opposition to this the evidence shows that the respondent not only did not 'refuse' to build such plant, but actually did build it and did utilize the casinghead gas at the earliest possible time." to create the impression in the mind of the court that they used *all* the gas after the plant was built. As a matter of fact, they used not to exceed approximately 2% of the

gas produced. Their superintendent testified, "It was a long time after the plant was in operation that we ceased to burn gas on the Schereshoveck and Chapman leases. We tried insofar as we could, to take that gas equitably from all the leases we have in the Salem pool." (R. 105). That evidence was brought out by defendant's counsel from their own witness. Three disinterested witnesses testified that the flares were "50 to 60" feet high (R. 112, 121, 124). The answer of the defendant admits burning the gas, without qualification as to time (R. 27). Defendant's superintendent testified that they produced a "large volume of gas" "there was no means possible of taking care of such an enormous volume of gas" (R. 103). Now counsel have reduced it to $300 worth, and the court did not give us even that, admitted by counsel (R. 175).

With reference to the computations concerning which they complain, the general superintendent testified that the pipes were 2" to 4" in diameter (R. 47); were from 100 to 150 feet long (50 feet in height brought the length to 200 feet) (R. 47); the pressure was 12 to 15 pounds (R. 50); the average depth of the wells was 2500 feet, the temperature was 1° per hundred feet (R. 74) which with the base of 60° added brought it to 85°; that the specific gravity was 1.16 (R. 76), which gives us all the information needed, *from defendant's own records* for computation of the amount of gas flowing through those pipes, in accordance with the Weymouth Formula (R. 131), concerning which counsel for defendant said: "He is entirely correct that the Weymouth Formula for the flow of natural gas through pipe lines is generally accepted." (R. 174). The correctness of the computations was never attacked.

Again at page 8, their statement indicates that as soon as the plant was built they took all the gas. The flares, as shown by the testimony of their superintendent continued

for years after the plant was built. Counsel were very careful not to say that they took all the gas after completion of the plant, yet they tried to create that impression. Again at page 4, they say "Again in the same paragraph petitioner, speaking of the gas which could not be marketed or utilized prior to construction of the plant". That is another statement which assumes something which did not exist. All of the gas could have been marketed, had they wanted to. We spoke, not of the gas prior to the construction of the plant, *but of all the gas produced,* of which less than 1% per cent was produced prior to building the plant (R. 56, 58).

In point III, defendant claims to own the gas, but has never paid for 98% of it. In the case of *Jilek* v. *C. W. & F. Coal Co.,* 382 Ill. 241, cited under this head, the Supreme Court in passing on a mineral deed such as that held by the petitioner, said at page 248. "He is the owner of the mineral estate". Just how defendant can claim ownership without payment therefor under that case is not explained. True, the Circuit Court said it was the owner, *but coupled with it the statement that they owed the royalty therefor.* In the *Jilek* case the court was talking about the grantee (the petitioner in this case), no lease or lessee was involved. When counsel used the expression "grantee or lessee", they called on their imagination for the "lessee". In a number of other cases they state facts by assumption or innuendo which are simply not true. We stated facts baldly, instead of innuendo because we were ready to stand back of them as the truth.

PETER L. GUTH,
Petitioner,

Per ALBERT H. FRY,
His Attorney.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1947.

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## No. 450

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PETER L. GUTH,
Petitioner,

vs.

THE TEXAS COMPANY,
Respondent.

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## MOTION FOR REHEARING.

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Now comes Peter L. Guth, Petitioner, and respectfully asks a rehearing and reconsideration of his petition for Writ of Certiorari, and suggests, that owing to improper and inept pleading and a crowded calendar, this Court must have overlooked some important matters in the said petition, for instance:

1. This Court must have overlooked the fact that it was dealing with the rights of a *cestui que trust*, who

was forced to stand by helplessly, while his property, valued at $112,000 was destroyed by the trustee, solely to save for the trustee, the cost of putting it back into the formation, a small fraction compared with its value, and the courts deny him any relief. In Heaven's name! We cannot brand that as American justice!

2, This Court must have overlooked the fact that this decision is squarely contrary to the decision of this Court in the case of *Ohio Oil Co.* v. *Indiana*, 177 N. S. 190, where the defense urged was identical with the defense in this case. May we suggest that if this Court intended to overrule that case, the legal fraternity should be apprised of the weakness in that case, to avoid falling into the error of following a decision which is no longer the law? The opinion of the Circuit Court does not show that weakness.

3. This Court, under a severe load of work, must have overlooked the fact that the denial of the writ makes the opinion of the Circuit Court, the opinion of this Court, and in effect overrules a large number of decisions on the question of damages and of vastly more importance, this decision says, in effect, that a trustee may destroy the property of the trust, solely to save money for itself, without liability, contrary to the spirit of all the decisions in trust cases.

4. This Court, in the rush necessitated by a large calendar, must have overlooked the fact that defendant set up no real defense; admitted that it destroyed gas belonging to another, and their expert witness admitted that it could have been put back into the formation and saved, therefore it was unnecessary to destroy it.

5. This Court must have overlooked the fact that this decision is squarely contrary to the decisions which hold that the royalty owner or lessor is entitled to all the gas which the premises will produce, some of which are set forth in the petition.

6. This Court must have been misled by the fact that, while the defendant processed only a small part of the gas—about 2%—its defense was so worded as to indicate that it tried to save all the gas and did save all, after the processing plant was built, which was untrue. The flares continued long after the plant was built and by far the greater part (98%) was burned after the plant was built, owing to the absence of any attempt on the part of the defendant to save it.

7. This Court, under the strain of a large calendar, failed to notice that the defendant, nor the Circuit Court, could muster a single decision to uphold their pertinent contentions, because none can be found to uphold the unnecessary destruction of the property of another, without compensation.

8. This Court must have overlooked the fact that the defendant destroyed 98% of the gas under the premises, solely that it might make large quick profits through capacity production, which is not permitted in other oil states, because of losses endangered thereby, for which the owners are at the mercy of the defendant, after relief has been denied by the courts.

As a consequence, this petitioner respectfully prays, that a reconsideration and rehearing may be granted; that a writ of certiorari may be granted and that this Court proceed as provided by law and the rules of this Court, in order that justice may be done in the matter; that the judgment below be reversed, with directions to that court to enter a judgment in favor of the plaintiff, as the law and justice dictates. And your petitioner will ever pray,

PETER L. GUTH, Petitioner,

By ALBERT H. FRY,
His Attorney,
123 West Madison Street,
Chicago, Illinois.